

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AIGA FAASA,) NO. EDCV 06-01174 SS
Plaintiff,)
v.)
MICHAEL J. ASTRUE,)
Commissioner of the Social)
Security Administration,)
Defendant.)
)

INTRODUCTION

Aiga Faasa ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying her application for disability benefits. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED for further proceedings.

THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

To qualify for disability benefits, a claimant must demonstrate a medically determinable physical or mental impairment that prevents him from engaging in substantial gainful activity¹ and that is expected to result in death or to last for a continuous period of at least twelve months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work he previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

To decide if a claimant is entitled to benefits, an ALJ conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

- (1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.
- (2) Is the claimant's impairment severe? If not, the claimant is found not disabled. If so, proceed to step three.
- (3) Does the claimant's impairment meet or equal one of list of specific impairments described in 20 C.F.R. Part 404,

¹ Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

Subpart P, Appendix 1? If so, the claimant is found disabled. If not, proceed to step four.

(4) Is the claimant capable of performing his past work? If so, the claimant is found not disabled. If not, proceed to step five.

(5) Is the claimant able to do any other work? If not, the claimant is found disabled. If so, the claimant is found not disabled.

Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. §§ 404.1520(b)-(g)(1) & 416.920(b)-(g)(1).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante, 262 F.3d at 953-54. If, at step four, the claimant meets his burden of establishing an inability to perform past work, the Commissioner must show that the claimant can perform some other work that exists in "significant numbers" in the national economy, taking into account the claimant's residual functional capacity ("RFC"),² age, education, and work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may do so by the testimony of a vocational expert or by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240

² Residual functional capacity is "what [one] can still do despite [his] limitations" and represents an "assessment based upon all of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

1 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
2 (strength-related) and nonexertional limitations, the Grids are
3 inapplicable and the ALJ must take the testimony of a vocational expert.
4 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

5

6 **FACTUAL BACKGROUND**

7

8 Plaintiff filed her applications for disability benefits on August
9 12, 2004. (AR 10). She alleged that her disability began on July 1,
10 2004. (Id.). Her claims were denied initially and upon
11 reconsideration. (Id.). Plaintiff requested a hearing before an
12 Administrative Law Judge ("ALJ"). A hearing was held on June 23, 2006,
13 before ALJ Keith A. Varni. Plaintiff was represented at the hearing by
14 her attorney. (Id.). Plaintiff's date of birth is August 5, 1959. (AR
15 59). She was 47 years old at the time of the hearing.

16

17 Plaintiff asserted that she was unable to work due to rheumatoid
18 arthritis, swelling in her legs and an ulcer in her left leg. (AR 30).
19 The ALJ also found that Plaintiff suffers from morbid obesity. (AR 11).
20 Plaintiff previously worked (from 1997 to 2004) in a warehouse. (AR
21 62). She alleges that she stopped working due to the pain from her
22 arthritis. (Id.). She has taken Ibuprofen, Prednisone, Furosimide
23 [sic] and Methotrexate [sic] for her arthritis pain. (AR 75, 87).
24 Plaintiff asserts that she can "hardly stand on her feet because they
25 hurt so much" and that her hands "stay closed most of the time because
26 they hurt to open them." (AR 76).

1 Plaintiff was examined by Lydia E. Villanueva, M.D., at the United
2 Family Care Clinic on August 30, 2004. (AR 91). At that time,
3 Plaintiff complained that she could not wear shoes. (Id.). She was
4 diagnosed with bilateral lower-extremity edema, overweight (weighing in
5 at 320 pounds), and suffering from a wound in her left foot. She was
6 seen in August at the clinic for care of her left foot. (AR 92-97). On
7 August 5, 2004, x-rays were taken which showed severe degenerative
8 arthritic changes of the foot. (AR 98). On June 29, 2004, an x-ray
9 showed "hallux valgus deformity with moderate-to-severe degenerative
10 arthritis of the left foot [and] severe intertarsal disease." (AR 110).
11 On January 30, 2004, Plaintiff was examined by Dr. Villanueva. (AR
12 113). Plaintiff complained that she had gained a lot of weight since
13 taking prednisone for her arthritis. (AR 113). Nonetheless, Dr.
14 Villanueva continued Plaintiff's prescriptions for methotrexate and
15 prednisone. (Id.).

16

17 **STANDARD OF REVIEW**

18

19 Under 42 U.S.C. § 405(g), a district court may review the
20 Commissioner's decision to deny benefits. The court may set aside the
21 Commissioner's decision when the ALJ's findings are based on legal error
22 or are not supported by substantial evidence in the record as a whole.
23 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
24 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

25
26 "Substantial evidence is more than a scintilla, but less than a
27 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
28 which a reasonable person might accept as adequate to support a

1 conclusion." Id. To determine whether substantial evidence supports
2 a finding, the court must "'consider the record as a whole, weighing
3 both evidence that supports and evidence that detracts from the
4 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny
5 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can
6 reasonably support either affirming or reversing that conclusion, the
7 court may not substitute its judgment for that of the Commissioner.
8 Reddick, 157 F.3d at 720-21.

9

10 **THE ALJ'S DECISION**

11

12 The ALJ found that Plaintiff met the insured status requirements
13 of the Social Security Act through December 31, 2004. (AR 12). She has
14 the following severe impairments: rheumatoid arthritis, degenerative
15 changes of the left foot and morbid obesity. (Id.). The ALJ concluded
16 that none of Plaintiff's impairments met the listings and noted that the
17 State Agency reviewing physician reached the same conclusion. (Id.).
18 The ALJ found that Plaintiff has the residual functional capacity
19 ("RFC") to perform sedentary level work activity as determined by the
20 State Agency review physicians. (Id.).

21

22 The ALJ found that the medical evidence did not support Plaintiff's
23 allegations of debilitating impairments. (Id.). The ALJ relied heavily
24 on Plaintiff's lack of treatment and failure to seek treatment from
25 local county clinics. (Id.). Furthermore, although the record shows
26 (and the ALJ acknowledged) that prescribed medications caused weight
27 gain, the ALJ found that Plaintiff "obviously" failed to follow advice
28 to exercise and lose weight. (Id.). The ALJ rejected Plaintiff's

1 testimony and the testimony of her daughter, although it was not
2 entirely clear what grounds the ALJ relied upon for rejecting such
3 testimony. Ultimately, the ALJ found that Plaintiff had a RFC for the
4 full range of sedentary work and was "not disabled." (AR 14).

5

6 **DISCUSSION**

7

8 **A. The ALJ Failed In His Duty To Develop The Record**

9

10 A Social Security applicant has the duty to prove that she is
11 disabled. See 42 U.S.C. § 423(d)(5). The Code of Federal Regulations
12 explains:

13

14 You have to prove to us that you are blind or disabled.
15 Therefore, you must bring to our attention everything that
16 shows that you are blind or disabled. This means that you
17 must furnish medical and other evidence that we can use to
18 reach conclusions about your medical impairment(s) and, if
19 material to the determination of whether you are blind or
20 disabled, its effect on your ability to work on a sustained
21 basis. We will consider only impairment(s) you say you have
22 or about which we receive evidence.

23

24 20 C.F.R. § 404.1512(a)(2000).

25

26 However, if the evidence produced by the claimant is ambiguous or
27 inadequate, the ALJ has a duty to develop the record. Tonapetyan v.

1 Halter, 242 F.3d 1144, 1150 (9th Cir. 2001). Here, the evidence clearly
2 showed that Plaintiff suffered from rheumatoid arthritis, degenerative
3 changes of the left foot and morbid obesity. However, the medical
4 evidence in the record was insufficient to conclude how limiting these
5 impairments are on Plaintiff's ability to work.

6

7 The ALJ faults Plaintiff for failing to seek treatment from a
8 county clinic. However, there is enough medical evidence in the record
9 to support a finding that Plaintiff suffered from multiple severe
10 impairments. There is no evaluation or treatment, however, from a
11 rheumatologist, a specialist who treats rheumatoid arthritis. It is
12 difficult to tell from this record and from Plaintiff's testimony how
13 severe Plaintiff's rheumatoid arthritis truly is or how limiting. There
14 is evidence showing that Plaintiff received on-going treatment and
15 medication for her arthritis. Plaintiff asserted that her arthritis was
16 so painful that she could not stand or open her hand. In order to
17 fairly evaluate these assertions, more information about Plaintiff's
18 arthritis is necessary.

19

20 This matter is therefore remanded for further development of the
21 record. In particular, the ALJ should require Plaintiff to be evaluated
22 by a rheumatologist in connection with her disability application. The
23 rheumatologist should review the medical records and examine Plaintiff,
24 then offer his opinion regarding her impairments. This doctor should
25 also consider the impact of Plaintiff's obesity on her condition(s).

26 \\

1 **B. Remand Is Required For Consideration Of**
2 **The Impact of Plaintiff's Obesity on Her**
3 **Arthritis**

4

5 The ALJ notes that Plaintiff suffers from morbid obesity. (AR 12).
6 However, no where in his decision does he discuss the effect of
7 Plaintiff's obesity on her other impairments. Ninth Circuit law clearly
8 requires an ALJ to perform this task. This Court is bound by Ninth
9 Circuit authority. See Bell v. Hill, 190 F.3d 1089, 1092 (9th Cir.
10 1999)(district courts within the Ninth Circuit must follow controlling
11 circuit precedent).

12

13 Where there is evidence of obesity, the ALJ must determine the
14 effect of the claimant's obesity upon his other impairments, his ability
15 to work, and his general health. Celaya v. Halter, 332 F.3d 1177, 1181
16 (9th Cir. 2003); see also Social Security Ruling 02-01p (requiring an
17 ALJ to consider the effects of obesity at several points in the five-
18 step sequential evaluation). This is particularly true for cases, like
19 this one, in which the ALJ concludes that the claimant's obesity is a
20 "severe" impairment. Burch v. Barnhart, 400 F.3d 676, 682 (9th Cir.
21 2005). The ALJ did not follow Celaya's instructions in considering
22 Plaintiff's obesity. Upon remand, the ALJ must consider the effect of
23 Plaintiff's obesity upon her other impairments, her ability to work and
24 on her general health.

1 **C. The ALJ Failed To Provide Clear and Convincing**
2 **Reasons For Rejecting Plaintiff's Subjective Pain**
3 **Testimony**

5 Whenever an ALJ's disbelief of a claimant's testimony is a critical
6 factor in a decision to deny benefits, as it is here, the ALJ must make
7 explicit credibility findings. Rashad v. Sullivan, 903 F.2d 1229, 1231
8 (9th Cir. 1990); see Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir.
9 1990) (implicit finding that claimant was not credible is insufficient).
10 Unless there is affirmative evidence showing that the claimant is
11 malingering, the ALJ's reasons for rejecting the claimant's testimony
12 must be "clear and convincing." Lester, 81 F.3d at 834. As long as
13 plaintiff offers evidence of a medical impairment that could reasonably
14 be expected to produce pain, the ALJ may not require the degree of pain
15 to be corroborated by objective medical evidence. Bunnell v. Sullivan,
16 947 F.2d 341, 346-47 (9th Cir. 1991) (en banc); Smolen v. Chater, 80
17 F.3d 1273, 1282 (9th Cir. 1996).

18
19 An ALJ can, however, reject plaintiff's testimony regarding the
20 severity of her symptoms if he points to clear and convincing reasons
21 for doing so. See Smolen, 80 F.3d at 1283-84. To determine whether
22 plaintiff's testimony regarding the severity of his symptoms is
23 credible, the ALJ may consider, among other things, the following
24 evidence: (1) ordinary techniques of credibility evaluation, such as the
25 claimant's reputation for lying, prior inconsistent statements
26 concerning the symptoms, and other testimony by the claimant that
27 appears less than candid; (2) unexplained or inadequately explained
28 failure to seek treatment or to follow a prescribed course of treatment;

1 and (3) the claimant's daily activities. Id. at 1284. If the ALJ's
2 credibility finding is supported by substantial evidence in the record,
3 the Court may not engage in second-guessing. Thomas v. Barnhart, 278
4 F.3d 947, 959 (9th Cir. 2002).

5
6 Here, the ALJ essentially provided one reason only for rejecting
7 Plaintiff's testimony -- that she failed to seek continued treatment.
8 (AR 12-14). The Ninth Circuit recently rejected a finding of non-
9 disability, based in part on the plaintiff's failure to seek treatment,
10 where it was clear that the plaintiff lacked funds for treatment. See
11 Orn v. Astrue, ____ F.3d ___, 2007 WL 2034287 (9th Cir.
12 2007) ("[D]isability benefits may not be denied because of the claimant's
13 failure to obtain treatment [he or she] cannot obtain for lack of
14 funds.") Id. at *12. Although case law supports "a lack of treatment"
15 as one possible reason for rejecting credibility, see Burch, 400 F.3d
16 at 682, it is improper to rely on it as the sole reason, particularly
17 when a claimant offers an explanation for her failure to seek treatment
18 (i.e., a lack of funds). Plaintiff testified that she was not seeing
19 a doctor because she did not have health insurance or MediCal. (AR
20 135). She further testified that she would like to see a doctor for her
21 condition. (Id.).
22

23 As the ALJ failed to provide clear and convincing reasons for
24 rejecting Plaintiff's testimony, remand is required. Upon remand, and
25 if the ALJ again finds Plaintiff lacking in credibility, the ALJ must
26 provide clear and convincing reasons. In addition, if the ALJ rejects
27 lay witness testimony, he must provide express reasons germane to that
28

1 witness for rejecting her testimony. Stout v. Commissioner, 454 F.3d
2 1050, 1053 (9th Cir. 2006)

3

4 **D. Remand Is Required to Remedy Defects in the ALJ's Decision**

5

6 Remand for further proceedings is appropriate where additional
7 proceedings could remedy defects in the Commissioner's decision. See
8 Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir.), cert. denied, 531 U.S.
9 1038, 121 S. Ct. 628, 148 L. Ed. 2d 537 (2000); Kail v. Heckler, 722
10 F.2d 1496, 1497 (9th Cir. 1984). Because remand is required on the
11 grounds stated above, the Court does not reach Plaintiff's contention
12 that the ALJ erred by failing to call a vocational expert.

13

14 **CONCLUSION**

15

16 Consistent with the foregoing, and pursuant to sentence four of 42
17 U.S.C. § 405(g),³ IT IS ORDERED that judgment be entered REVERSING the
18 decision of the Commissioner and REMANDING this matter for further
19 proceedings consistent with this decision. IT IS FURTHER ORDERED that
20 the Clerk of the Court serve copies of this Order and the Judgment on
21 counsel for both parties.

22 /S/

23 DATED: October 25, 2007

24

SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

25

26

27 ³ This sentence provides: "The [district] court shall have power
28 to enter, upon the pleadings and transcript of the record, a judgment
affirming, modifying, or reversing the decision of the Commissioner of
Social Security, with or without remanding the cause for a rehearing."